

Employer Responsibilities Under the Americans With Disabilities Act

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What we will cover

- Overview of the ADA:
 - Who is a covered employer?
 - Who is a qualified individual?
 - What is an actual disability?
- How to engage in the interactive process to determine if accommodation is reasonable.
- How to identify and prevent discrimination and harassment.

Essential terms

- Covered Employer.
- Disability.
- Limits major life activities.
- Qualified individual.
- Essential job functions.
- Reasonable accommodation.



Who is a covered employer?

- All employers with 15 or more employees.
- Includes private sector, local and state governments, employment agencies, and labor unions.



Application process

- ADA prohibits employers from—
 - Asking applicants if they have a disability or asking questions about the severity of a disability.
 - Requiring a medical examination BEFORE extending a job offer.

Medical examinations

- May NOT require applicants to undergo medical examinations until after a job offer is extended.
- May require medical examinations IF everyone working in that job classification is required to undergo a medical examination.
- If withdraw offer based on medical examination, must show that reasons were job related and supported by business necessity AND that no reasonable accommodation existed.
- May NOT require current employees to undergo medical examinations unless job related and supported by business necessity.
- All medical information must be kept confidential.

What is a disability?

- With respect to an individual—
 1. A **physical or mental impairment** that **substantially limits** one or more **major life activities** of such individual;
 2. A **record** of such an impairment; or
 3. Being **regarded** as having such an impairment.



Is the individual a person with an actual, current disability?

1. Does the person have a **physical or mental impairment**?
2. Does the impairment affect one or more of his or her **major life activities**?
3. Is the effect a **substantial limitation**?



Major life activities

ADA creates two lists of “major life activities.”

1. General list.
2. Major bodily functions.

Statute requires a broad interpretation.

“Includes but not limited to” language in both.



General list of major life activities

- Caring for oneself.
- Performing manual tasks.
- Seeing.
- Hearing.
- Eating.
- Sleeping.
- Walking.
- Standing.
- Lifting.
- Bending.
- Speaking.
- Breathing.
- Learning.
- Reading.
- Concentrating.
- Thinking.
- Communicating.
- Working.

Major bodily functions

- Immune system.
- Normal cell growth.
- Digestive.
- Bowel.
- Bladder.
- Neurological.
- Brain.
- Respiratory.
- Circulatory.
- Endocrine.
- Reproductive functions.

One “major life activity” is enough

- A person’s impairment meets the definition of disability if it substantially limits person in **just one major life activity**.
- The person is not excluded from coverage simply because person is **not** substantially limited in **other** major life activities.
 - In other words, a person still has a disability even if he or she is able to do many other things.



Substantially limits

- Old standard was “significantly restricted.”
- Congress decided that was too narrow.
- Changed new standard to “substantially limits.”



Substantially limits

- The individual must be substantially limited as compared to most people in the general population.
- Should be construed broadly in favor of expansive coverage.
- Involves fact-specific analysis.



Substantially limiting

- “Episodic” or cyclical impairments, or impairments that go into remission.
 - Are considered disabilities if they would substantially limit a major life activity **when active**.
 - Examples: cancer, epilepsy, depression, bipolar disorder, post-traumatic stress disorder (PTSD), other psychiatric conditions.



Mitigating measures

- Congress **explicitly rejected** Supreme Court's holding that mitigating measures must be considered in determining substantial limitation.
- Under ADA, employers must consider how the impairment affects the person **before** or **without** the mitigating measure.



Exception

- You **shall** consider the effect of **ordinary eyeglasses and contact lenses**.
 - Defined as “lenses that are intended to fully correct visual acuity or eliminate refractive error.”
 - If the employee can’t see well without them but can see well with them, then vision impairment is not “substantially limiting.”
- These are distinguished from **low vision devices**, defined as “devices that magnify, enhance, or otherwise augment a visual image.”



Flip side of mitigating measures

- Employer or employment agency **cannot** consider an applicant's uncorrected vision as a job qualification.
 - In other words, must consider the applicant's vision **with** glasses or contacts **unless** the requirement is “job related and consistent with business necessity.”



Is the individual a person with a record of a disability?

- Past history of a genuine disability.
- Misclassified as having a disability.
- The record or misclassification has to meet the three elements of an actual disability: impairment, major life activity, substantial limitation.



Has the person been regarded as having a disability?

- Either the individual has an impairment, but—
 - Impairment doesn't substantially limit a major life activity, **or**
 - Impairs a major life activity because of other people's attitudes, **or**
 - Doesn't have an impairment, but is treated as having one.



Has the person been regarded as having a disability?

- An employee must prove—
 - The person was subjected to adverse treatment.
 - Treatment was because of a physical or mental impairment, regardless of whether—
 - Impairment is actual or perceived (whether or not it really exists).
 - Impairment limits or is perceived to limit a major life activity.



Has the person been regarded as having a disability?

- Exception: Impairments that are minor and transitory (6 months or less).
 - Example: common cold
- An individual who is “regarded as” a person with a disability is not entitled to reasonable accommodation.
- Limited to prohibition on discrimination and harassment.



What about mental impairments?

- Irritability?
- Depression?
- Stress?
- Bi-polar disorder?
- Attention deficit disorder?
- Sleepiness?



Mental impairments

- Court have ruled these as mental impairments:
 - Mental illness.
 - Intellectual disability.
 - Depression.
 - Bipolar disorder.
 - Post Traumatic Stress Disorder (PTSD)
 - Generalized anxiety.
- EEOC guidance indicates **stress alone** does not qualify as impairment.



If there is a disability, what then?

- Determine if the employee is a qualified individual.
- Identify whether a reasonable accommodation exists.



Qualified individual

- Can perform **essential functions** **with** OR **without** reasonable accommodation.
- Has skills, education, experience, or other job-related requirements of employment.



Essential job functions

- Employer's judgment to be considered.
- Job descriptions (written before interviewing or hiring).
- Reason job exists is to perform that function.
- Limited employees available to perform that function.
- Function is highly specialized and employee was hired to perform that function.



Essential job functions (cont.)

- Amount of time spent on the job performing that function.
- Consequences of not requiring the disabled employee to perform the function.
- Terms of a collective bargaining agreement.
- Work experience of past employees in the job.
- Work experience of current employees in the job.



Qualified issues

- *Carroll v City of Stone Mountain*, 544 Fed. Appx. 926 (11th Cir. 2013)
 - Court held that police officer was—
 - Suffering from PTSD and could not yet return to work.
 - Not capable of meeting essential function of job and therefore was not “qualified.”
 - Termination was not discriminatory.
 - Eleventh Circuit affirmed grant of summary judgment in favor of employer.

Qualified issues

- *Stragepede v. City of Evanston, Ill.*, --- F.3d --- (7th Cir. July 31, 2017)
 - Court held that employee of water works was—
 - Suffering from traumatic brain injury.
 - Returned to work, but employee had difficulty completing tasks and locating houses.
 - Fact issue existed as to whether employee was capable of meeting essential function of job and therefore was “qualified.”
 - Jury returned \$225k verdict in favor of employee.
 - Seventh Circuit affirmed jury verdict.

Essential job functions for MOST jobs

- Physical attendance.
- Arriving at work on time.
- Ability to handle reasonably necessary stress.
- Work reasonably well with others.
- Ability to work independently.
- Ability to stay awake.



Other essential functions

- Ability to work full-time or overtime.
- Ability to work a specific shift.
- Ability to work rotating assignments.
- Ability to travel.
- Standing or walking.
- Oral communication skills.
- Lifting.
- Manual dexterity.

Note: With physical “essential functions,” employer may rely on doctors’ notes that show limitations considered “essential” to employer.



Employee is a qualified individual
with an actual disability.

Now what?



Response to request for accommodation

- Generally prompted by request from employee.
- ADA does not require employers to speculate about accommodation needs.
- EEOC guidance suggests accommodation should be provided **without** a request if employer:
 - Knows employee is disabled.
 - Knows employee is experiencing workplace problems due to disability.
 - Knows disability prevents employee from requesting a reasonable accommodation.

Interactive process

- Appropriate accommodation may be clear and obvious in certain situations.
- If not obvious, employer must engage in informal “interactive process” to identify whether there is a reasonable accommodation.
- Once put on notice that individual has a disability, duty to engage in interactive process is triggered.
- Intended to be a dialogue between employer and employee to identify a reasonable accommodation.
- Failure to engage in the interactive process—even if there is no reasonable accommodation—may violate ADA.

Reasonable accommodations

- Definition:
 - Any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.



Reasonable accommodations

- Job restructuring.
- Part-time or modified work schedules.
- Reassignment to vacant position.
- Acquisition or modification of equipment or devices.
- Allowing for additional bathroom breaks.
- Unpaid leave.



General requirements for accommodations

- Employer must know there is a need for accommodation.
- Must allow employee to perform essential job functions.
- If, after the accommodation is made, the employee still can't perform essential job function, then ADA claim fails.
- Must relate to major life activity impaired by disability.
- Employee may offer suggestions, but decision is ultimately up to employer.



What's reasonable is up to employers

Stewart v. Happy Herman's Cheshire Bridge, Inc.,
117 F.3d 1278, 1286 (11th Cir. 1997).

“A qualified individual is not . . . entitled to the accommodation of his choice, but rather to a reasonable accommodation.”



Unreasonable accommodations

- Eliminates essential job function from employee's responsibilities.
 - *Woodruff v. School Bd. of Seminole County*, 304 Fed. Appx. 795, 800 (11th Cir. 2008): "An accommodation is not reasonable, and thus, not required, if it does not enable the employee to perform the essential functions of her job."
- Places undue burden on employer (significant expense or difficulty in implementing).

Eliminating essential functions

- Not required to eliminate **essential functions**.
- Essential functions are fundamental job duties of the employment position the individual with a disability holds or desires.

29 C.F.R. § 1630.2(n)(1).



Undue hardship exception

- A requested accommodation imposes **undue hardship** when it requires significant difficulty or expense to the employer.
- An employer doesn't have to allow leave when it can demonstrate that the accommodation would impose an undue hardship on the operation of its business.



Factors to consider

- Cost of the accommodation.
- Overall financial resources of the **facility or entity.**
- Type of operation.
- Effect of the accommodation upon the operation of the facility.

Unreasonable accommodations

- Directly threatens health or safety of employee requesting it or other employees. 29 C.F.R. § 630.2(r).
- Requires other employees to work harder or requires the employer to “bump” another employee to another position.
- Hiring another employee to perform disabled employee’s job functions.
- Indefinite leave.



Permanent light duty (or any permanent exemption from work)

- ADA does **not** require permanent light-duty work.



Telecommuting

- ADA does **not** require permanent telecommuting.
- EEOC guidance acknowledges most jobs have essential duties that can only be performed in the workplace.
- *Credeur v. State of La.*, 860 F.3d 785 (5th Cir. 2017)—telecommuting was not reasonable accommodation for lawyer even though employer allowed telecommuting for several months after kidney transplant.

EEOC:

No maximum-leave policies

- Employer has an obligation to assess each requested accommodation on a case-by-case basis.
- EEOC says employers may not apply a policy under which employees are automatically terminated after they have been on leave for a certain period of time, unless—
 - There is another effective accommodation or
 - Granting the additional leave would cause an undue hardship.



EEOC:

No-fault policies are problematic

- No-fault attendance policies are those where employees are subject to discipline for reaching a certain number of absences, regardless of the cause of the absences.
 - Verizon paid \$20 million to settle an EEOC lawsuit alleging a no-fault attendance policy adversely affected persons with disabilities.
 - Sears entered into a similar settlement.



Intermittent leave

- Courts disfavor intermittent leave under the ADA where attendance is important to the employer.
- Courts have addressed the issue of intermittent leave under the ADA by asking whether attendance is an essential function of the job.
- Courts say that an employer who needs reliable workers need not accommodate unpredictable absences by granting unplanned, intermittent leave.

ADA medical documentation

- ADA allows broader medical certifications than the FMLA.
- ADA also allows fitness-for-duty examinations when the employee appears unfit for work.
- Use a tailored letter for these procedures with a GINA disclaimer.



ADA medical certifications

- ADA allows inquiries into the nature and extent of a person's condition, provided they are job related, so that employer can determine—
 - Whether employee has a disability.
 - Whether employee is a qualified person with a disability.
 - What, if any, reasonable accommodation employer may need to provide.



Preventing discrimination and harassment

- Have anti-discrimination and harassment policy in place.
- Train managers and employees on anti-discrimination and harassment policy.
- Know what can be asked during an interview.

Questions?

